IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Second Circuit in *United States ex rel. Ross* v. *McMann* (hereinafter *Ross*) (A. 109-161)* are reported at 409 F. 2d 1016. The District Court opinion (A. 14-16) is not reported. The state courts wrote no opinions in denying *coram nobis* relief. The affirmance

* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix in this Court.

of the Appellate Division is reported at 272 N.Y.S. 2d 969 (not officially reported).

The majority and dissenting opinions of the Second Circuit in *United States ex rel. Dash* v. *Follette* (hereinafter *Dash*), decided together with *Ross* (A. 109-161), are reported at 409 F. 2d 1016. The opinion of the District Court (A. 37-38) is not reported. The order of the Appellate Division, affirming the denial of *coram nobis* relief is reported at 21 A. D. 2d 978. The opinion of the New York Court of Appeals affirming that denial is reported at 16 N. Y. 2d 493, 208 N. E. 2d 171.

The opinion of the Second Circuit in *United States ex rel. Richardson* v. *McMann* (hereinafter *Richardson*) (A. 162-172), is reported at 408 F. 2d 48. The opinion of the District Court (A. 83-87) is not reported. The state court wrote no opinions in denying *coram nobis* relief. The order affirming the denial is reported at 23 A. D. 2d 969.

The majority and dissenting opinions of the Second Circuit in *United States ex rel. Williams* v. *Follette* (hereinafter *Williams*) (A. 173-180), are reported at 408 F. 2d 658. The opinion of the District Court (A. 71-72) is not reported. The opinion of the state trial court (A. 59-60) in denying *coram nobis* relief is not reported. The order affirming the denial is reported at 25 A. D. 2d 620.

Jurisdiction

The judgments of the United States Court of Appeals in the *Ross, Dash* and *Richardson* cases were entered on February 26, 1969. The judgment in the *Williams* case was entered on March 20, 1969. The petition for certiorari was filed on May 24, 1969. Certiorari was granted on October 13, 1969.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Does an allegation that an otherwise voluntary plea of guilty was induced by the existence of evidence alleged now to have been illegally obtained state a claim which, if proved, would warrant relief by way of federal habeas corpus?

2. Should the rule of *Jackson* v. *Denno*, 378 U. S. 368 (1964) be held applicable to convictions based not on evidence in general or confessions in particular but on pleas of guilty entered before the decision in that case?

3. Was it appropriate to apply automatically the new rule announced below to cases which were final before it was announced?

4. Does the new rule announced below provide the necessary procedural guidelines for the allegations required to mandate an evidentiary hearing and for the conduct of the hearings themselves?

Statement of the Case

Respondents in these cases are four New York State prisoners* all convicted by virtue of their pleas of guilty to reduced charges from over six to nearly fifteen years ago.** All were represented by counsel before conviction

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* Since the decision below, Wilbert Ross has died. Although his case is now moot, it is discussed herein because the decision in *Ross* is the basis for the decision in the remaining three cases.

** Wilbert Ross was convicted in Kings County on March 14, 1955 of the crime of murder in the second degree to cover an indictment charging murder in the first degree. He was sentenced to a term of from 45 years to life in prison. Willie Richardson was convicted in New York County on October 9, 1963 of the crime of murder in the second degree to cover an indictment charging two counts of

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and through sentence. None appealed from the judgment of conviction.

Within periods ranging from eight months (Richardson) to ten years (Ross) after conviction, each brought a collateral attack against his conviction by way of coram nobis in the state trial court alleging in conclusory fashion a series of claimed errors infecting his plea. The applications were denied without hearings, the denials were affirmed by the Appellate Division and leave to appeal to the Court of Appeals was denied in *Ross, Richardson* and *Williams.* Leave was granted in *Dash* and the denial of relief affirmed in an opinion.*

Each respondent subsequently applied to a federal district court for habeas corpus relief. Each presented a series of conclusory, *pro forma* and not entirely consistent allegations which the district courts have come to recognize as typical in guilty plea cases.

The Ross Petition:

In a petition dated May 18, 1967, Wilbert Ross sought habeas corpus in the United States District Court for the Eastern District of New York, claiming that "the existence of a certain written inculpatory statement (hereinafter

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murder in the first degree. He was sentenced to a term of from 30 years to life in prison. Foster Dash was convicted in Bronx County on April 6, 1959 of robbery in the second degree to cover an indictment charging robbery in the first degree, grand larceny and assault. He was sentenced as a second felony offender to a term of from 8 to 12 years in prison. McKinley Williams was convicted in Bronx County on March 16, 1956 of the crime of robbery in the second degree to cover an indictment charging robbery in the first degree. He was sentenced to a term of from 7½ to 15 years in prison.

* *People* v. *Ross,* 272 N.Y.S. 2d 969 (2d Dept. 1966), *lv. den.* January 10, 1967; *People* v. *Dash,* 21 A. D. 2d 978 (1st Dept. 1964) *affd.* 16 N. Y. 2d 493, 208 N. E. 2d 171 (1965); *People* v. *Richardson,* 23 A. D. 2d 969 (1st Dept. 1965), *lv. den.* June 8, 1965; *People* v. *Williams,* 25 A. D. 2d 620 (1st Dept. 1966).

confession), which was given after the uttering of threats by police officials, served to aggravate the force of the threats which induced the plea . . ." (A. 2-3). He claimed that, in May, 1954, while in custody on a larceny charge he was taken by two detectives to the District Attorney's office and questioned about a murder committed a month and a half before. When he denied knowledge of the murder, he was told that his accomplice had confessed and that unless he told his story he would be sent to the electric chair for murder and kidnapping. Ross said that while he was persisting in his denial, detectives came quietly into the room until "at one time there were fourteen in all" (A. 4-5). Ross was permitted to hear, by means of an intercommunication device, his accomplice telling the police of Ross' participation in the murder. The detectives told him that the accomplice would testify and he would be electrocuted. His request to see an attorney having been denied, he gave a statement which was reduced to writing and which he signed (A. 6-7). Two days later he told the detectives where to find the gun and gave another statement, this time to the district attorney. He was not advised of his right to counsel or to remain silent and did not at this time ask for counsel (A. 8-9).

In October, 1954, while in state prison on the larceny charge he was returned to Kings County and arraigned on a first degree murder charge. A month later he was visited by an assigned attorney who did not ask him about the charge but only about his background (A. 9). About five or six weeks later the lawyer visited him again and Ross told him that he wanted to suppress the confession. The lawyer said "that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make 'a jury of twelve cousins' convict me and send me to the electric chair. He told me that he would 'get the

best possible break' for me from the District Attorney, but that I 'would be dead by the Fourth of July' if I risked a trial" (A. 9). In February, 1955 his lawyer told him that he could plead guilty to murder in the second degree and receive a sentence of from twenty years to life. "If I insisted on going to trial, well, he was my lawyer and would do what he could" but " 'there isn't a pair in the world to beat four aces' " (A. 10). Ross pleaded guilty to murder in the second degree and was sentenced to forty-five years to life in prison (A. 2).

The Dash Petition:

On October 4, 1965, Foster Dash applied for a writ of habeas corpus to the United States District Court for the Southern District of New York, claiming that, on February 26, 1959, he was arrested in New York City and brought to a police station, where a group of officers "began to beat and question relator about various crimes allegedly committed in New York County. Relator denied having knowledge of any crime, and thereupon, requested counsel to protect him in his constitutional rights" (A. 24).*

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* On February 9, 1959, a Mr. Schedletsky was held up and robbed by three men, at least one of whom was armed. Immediately after the crime one Fields was apprehended and, apparently, implicated Dash and two others, Waterman and Devine. On February 24, 1959, an indictment was returned in Bronx County charging Fields as a defendant and conspirator and naming the three robbers as "John Doe", "Richard Roe" and "Peter Loe". See *People* v. *Waterman*, 12 A. D. 2d 84, 208 N.Y.S. 2d 596 (1st Dept. 1960). After the indictment, and while in custody, Waterman was questioned by a detective to whom he made a complete confession also implicating Devine, Fields and Dash. See *People* v. *Waterman*, 9 N. Y. 2d 561, 175 N. E. 2d 445 (1961).

Waterman and Devine were tried and convicted of robbery in the first degree, grand larceny in the second degree and assault in the first second degree and were sentenced on December 1, 1959 to terms of from 15 to 20 years in prison. Dash and Fields pleaded guilty. Dash received a sentence of from 8 to 12 years as a second

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Dash contended that he was then taken to the Bronx where he was "beaten and questioned in incessant relays" and that he maintained his innocence and repeated his request for an attorney. He said that he was "held incommunicado for 7½ hours" and then taken to the office of the Assistant District Attorney who denied his request for counsel, who told him that he had already been indicted and said that if he did not cooperate he "would then fix it so that every crime that was then unsolved would be 'yours'" (A. 24-25). Dash then signed a "prefabricated confession" (A. 25).

On March 16, 1959, in Court, Dash rejected a plea to the highest charge in the indictment, robbery in the first degree, although his lawyer told him that "due to the confession" he should take it (A. 25). On April 1, 1959, in Court, the trial judge allegedly told him that he would receive the maximum penalty if he went to trial (A. 26) although "this statement of the trial court was not made on the open record" (A. 30). On April 6, 1959, Dash entered a plea of guilty to robbery in the *second* degree.

Dash additionally pointed out in his petition that his plea was entered before the decision of this Court in *Jackson* v. *Denno*, 378 U. S. 368 (1964) which he construed as meaning "that the only choice remaining to him . . . was to proceed to trial in the hope of challenging the admissibility of the alleged coerced confession" (A. 29).

The Williams Petition:

By application dated July 8, 1966, McKinley Williams sought habeas corpus in the United States District Court

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felony offender (A. 23). The convictions of Waterman and Devine were reversed on the ground that it was error to admit into evidence the post-indictment statements taken in the absence of counsel. (*People* v. *Waterman, supra,* 12 A. D. 2d 81, 9 N. Y. 2d 561). Thereafter, Waterman and Devine pleaded guilty to assault in the second degree and were sentenced to terms of from 2½ to 3 years in prison.

for the Southern District of New York. He claimed that he was arrested on January 25, 1956 in the Bronx "on an open charge" and not informed of any rights. The brief submitted on Williams' behalf in the Appellate Division, First Department on appeal from the denial of *coram nobis* and annexed as an exhibit to the habeas corpus petition, quotes the *coram nobis* petition as stating that while Williams was in custody, the police ". . . initiated to assault, intimidate and terrorize petitioner while intensively interrogating him about a two-day old alleged robbery . . . the inquisition, accompanied by threats, led by a detective known to petitioner as Michael Cleary, while petitioner was handcuffed to a desk and chair, continued without let-up until the next morning, and was climaxed by a pistol being brandished in petitioner face, by the said detective Cleary, and threatened to be *shot dead!*" Williams said that, out of fear and exhaustion he "capitulated and agreed to what actually consisted of agreeing to a tale narrated to him by police and later by a plainclothesman" who afterward represented himself to be an Assistant District Attorney. The *coram nobis* brief alleged that Williams was inadequately represented by counsel, that he had an alibi in that he was out of the state on the day the crime took place and that counsel told him he was pleading guilty to a misdemeanor. In discussing Williams' coerced confession claim, the *coram nobis* brief contended that Williams was precluded from going to trial by the actions of his attorney in misleading him, and for no other reason.

In his habeas corpus application Williams, self-described as a "20 year old indigent youth" (A. 49), contended for the first time that since he was convicted prior to *Jackson* v. *Denno,* 378 U. S. 368 (1964), "he could not have had a fair trial because of the mere existence of the confession and at the same time could not have had a fair determination on seeking to void it from the case" (A. 55). He described the situation as an "unfair pre-trial dilemma" (A. 55).

The claim that his attorney had misadvised him as to the nature of the charge to which he was pleading was also raised in the petition (A. 50). The alibi claim was not separately raised.

The Richardson Petition:

By petition verified July 2, 1965, Willie Richardson sought a writ of habeas corpus in the United States District Court for the Northern District of New York alleging that he was arrested on March 24, 1963 in New York County in connection with the homicide of two relatives; that he explained that he had changed from clothing which had become bloody from trying to stop a fight between the two; that he asked to see an attorney and was not permitted to do so; and that after "abuse threats and questioning I was finally coerced and forced to sign a confession against my will . . ." (A. 78).* The petition appeared to say that the guilty plea, entered some four months later, on July 22, 1965, was induced by the confession and it obliquely challenged the adequacy of counsel (A. 78-79). In a motion for reargument, Richardson sought to take advantage of the fact that the district judge had noted in his original opinion that his copy of the minutes of plea and sentence had not been formally certified by suggesting that there "may be a few pages lost" (A. 97) including an attempt by him to withdraw his plea, an assertion briefly alluded to in the original petition (A. 82) which also did not make it clear who had denied his application. Reargument was denied by the District Court (A. 98-100).

In his application to the Court of Appeals for the Second Circuit for a certificate of probable cause, Richardson

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* In his application for *coram nobis* Richardson alleged that he had made an involuntary confession and that his conviction "was based solely on this confession." The only factual allegations made were that he was arrested on a Sunday night and held until the following morning for arraignment.

alleged for the first time that his lawyer advised him that his plea would not preclude a later challenge to the voluntariness of the confession since a guilty plea would not be a waiver of his constitutional rights.

In a new affidavit, notarized on January 15, 1968 and annexed to his brief in the Circuit Court, Richardson claimed that the police confronted him with three people he had denied seeing earlier "because I did not wish to get them into any trouble" (A. 102); that his request to contact his attorney was denied; that the police told him that if he did not confess he would be convicted of first degree murder and electrocuted; that the police beat him and threatened him with electrocution for over an hour; and that he finally agreed to confess "to stop the beating" (A. 102-103). He continued that after he had been indicted, he was visited by an attorney who stayed with him for ten minutes, who took no notes and who told him that "he would get paid the same amount of money for representing me regardless of the outcome. He did not mention what he intended to do to help me or prepare my case" (A. 103). The next time Richardson saw his lawyer was for three or four minutes outside the courtroom on July 22, 1963. At that time the lawyer told him to plead guilty to second degree murder. Richardson said that he had not committed the crime and had confessed solely because of the beatings. The lawyer said that this was not the time to bring up the confession because if the confession was used at trial he would get the electric chair. He said the lawyer told him to save his life by pleading guilty to second degree murder and raise the confession issue later by way of habeas corpus. Richardson then entered the plea (A. 103-104).

Opinions Below

The District Court in *Ross** rejected the petition on the ground that "a plea of guilty constitutes a waiver of all non-jurisdictional defects in any prior stage of [the] proceedings against a defendant . . ." relying on *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965), *People* v. *Nicholson,* 11 N. Y. 2d 1067, 184 N. E. 2d 190 (1962) and *People* v. *Dash,* 16 N. Y. 2d 493, 208 N. E. 2d 171 (1965) (A. 15-16).

The District Court in *Dash*** rejected the confession claim relying on *Glenn* and on *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965) and *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965). The Court rejected the claim that the trial judge threatened the defendant with the maximum sentence by referring to the acceptance by the state courts of an affidavit filed by the prosecutor that no such threat had been made, *People* v. *Dash, supra,* and by considering the transcript of plea revealing that Dash "made an intelligent and uncoerced choice and that no promises or threats were made to him" (A. 37-38).

In *Williams,* the District Court*** regarded as "ingenious" the claim based on *Jackson* v. *Denno,* 378 U. S. 368 (1964), that Williams "should not be deemed to have waived his right to challenge the confession, because, under the then existing procedure for determining the voluntariness of confessions, he could not have had a fair trial" (A. 71). The Court pointed out that the plea was entered

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* United States District Court for the Eastern District of New York (BRUCHHAUSEN, J.).

** United States District Court for the Southern District of New York (CANNELLA, J.).

*** United States District Court for the Southern District of New York (CROAKE, J.).

some eight years before the *Jackson* decision and that it was "most difficult, therefore, to accept the assertion that the right to go to trial was relinquished because he believed he would not receive a fair determination on the issue of voluntariness" (A. 72). The Court thus rejected the claim that Williams was entitled to challenge his confession because "A voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." *United States ex rel. Glenn* v. *McMann, supra* at 1019 (A. 72). The Court also relied on *United States ex rel. Martin* v. *Fay,* 352 F. 2d 418 (2d Cir. 1965), for this proposition as well as for the proposition that the colloquy in open court at the time of plea with counsel present disposed of the claim that Williams believed he was pleading guilty to a misdemeanor. The Court also noted Williams' prior record in rejecting this claim (A. 72).

In the *Richardson* case, the District Court* relied heavily on the transcripts of plea and sentence (A. 88-95), stating that "it is difficult to understand from a reading thereof how any court could have taken additional safeguards to make certain that the plea was voluntarily and understandingly entered" (A. 85). Judge Brennan pointed out that the trial court ascertained that Richardson himself wished to plead guilty, that he had discussed the action with both his attorneys, that he had not been threatened, that no sentence promise had been made to him and that he had committed the murder to which he was offering the plea (A. 85-86). The district judge reiterated that "[i]t is impossible for this court to understand how the trial judge could have more conclusively established that the plea of guilty was both understandingly and voluntarily entered" pointing out that no attack was made on the plea at the time of sentence three months later and

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* United States District Court for the Northern District of New York (BRENNAN, J.).

that Richardson was now "apparently dissatisfied with the bargain" by which he was allowed to plead guilty to a reduced charge and to quash a second capital charge (A. 86). Having found the plea voluntary, and pointing to *United States ex rel. Martin* v. *Fay, supra,* the Court held that that plea waived prior non-jurisdictional defects relying on the *Glenn* case, *supra* (A. 86-87).

The Court of Appeals for the Second Circuit consolidated the *Ross* and *Dash* cases and considered them *in banc.* Subsequently, two separate panels reversed and remanded *Richardson* and *Williams* relying on *Ross* and *Dash.*

The majority opinion of the *in banc* Court, written by Judge Smith, viewed the *Ross* case as raising "the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain,* 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession" (A. 114).

It proceeded to answer this question without ever specifically making the threshold inquiry required by *Townsend,* that is, whether the allegations of the habeas corpus petition would, if proved, entitle the petitioner to relief. 372 U. S. at 307. Indeed, it completely ignored the specific allegations in the instant petitions and dealt instead with the general nature of the allegations required to mandate a federal evidentiary hearing in such cases.

The majority accepted "the well-established doctrine that *if* the plea *is* voluntary, it is an absolute waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant" but stated that that doctrine was being confused with the fact that an involuntary plea may be collaterally attacked (A. 115). The opinion reviewed

the genesis of the "confusion" between the two doctrines in its own prior decisions (A. 115-119) and held:

> "The rule should be stated as follows: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless, if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea." (A. 119)

In assessing voluntariness, all of the factors going to "' the ultimate question of whether the defendant, at the time he pled guilty had the free will essential to a reasoned choice . . .' " *United States* v. *Colson*, 230 F. Supp. 953, 955 (S.D.N.Y. 1964), must be taken into account including a coerced confession or an illegal search and seizure (A. 115).

Reading this rule in the context of the opinion, it appears that while "the mere existence of a coerced confession [is not] enough to invalidate a later guilty plea by a defendant represented by counsel" (A. 114), a guilty plea will be considered involuntary if it was "substantially motivated by a coerced confession" (A. 122, 125, 176).

In the language of the decision and in light of the petitions which it considered, only three allegations would appear to be required before the federal hearing is to be held. The first is that there was either a coerced confession or an illegal search and seizure; the second, that the prior illegality induced the plea; and the third that the plea was entered prior to the decision of this Court in *Jackson* v. *Denno*, 378 U. S. 368 (1964). However, any hope expressed

by the concurrence that the majority opinion is limited to pre-*Jackson* cases is undercut by the majority's inclusion of an illegal search and seizure as a factor to be taken into account in determining the voluntariness of a plea of guilty and by claimed consistency with cases in the Third, Fifth, Sixth, Seventh and Ninth Circuits, none of which discussed the *Jackson* issue (A. 120).

The majority did suggest that, in determining the voluntariness of the plea, "substantial weight" is also to be given to the fact that a defendant was represented by counsel with whom he consulted. However, it is unclear whether this consideration is to be taken into account before or after a hearing is ordered. In a short passage of the opinion replete with inconsistencies, it is stated that:

> "Even where there is evidence that a confession has been coerced, there may be factors which would justify counsel for the accused, once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied, to advise a plea of guilty. Therefore, a mere conclusory allegation by a prisoner without more, that the existence of a coerced confession induced his guilty plea, in the absence of any particularized allegations as to how that confession rendered his plea involuntary, should not ordiarily be considered sufficient to predicate an order for a hearing." (A. 120)

The opinion went on to state in a footnote, that ordinarily there should be additional supporting material, such as the affidavit of the attorney, or exhibits or affidavits of persons with knowledge of the facts appended to the petition in the District Court. In *Ross,* however, as in the other cases decided in light of *Ross,* no such material was deemed necessary and no reason was stated as to why the present allegations were sufficient without such further support. The above quoted passage also seems to require that a motion

to suppress be made and denied before counsel can even legitimately consider recommending a guilty plea. However, this was the situation in few, if any, pre-*Jackson* guilty pleas in New York and need not be the case even after *Jackson*.

The broad scope of the rule announced below is highlighted by its reliance on dictum in *Reed* v. *Henderson*, 385 F. 2d 995 (6th Cir. 1967), stating that the claim that a plea was involuntary because induced by coerced admissions is a well stated ground for habeas corpus relief (A. 120-121).

Failing to find any factual connection between the alleged coercion of the confession and the claimed involuntariness of the plea, the Court was forced to rely on the fact that the plea of guilty was entered before the decision of this Court in *Jackson* v. *Denno*, *supra*, relying on its own decision in *United States ex rel. Rogers* v. *Warden*, 381 F. 2d 209 (2d Cir. 1967), which states that:

> "There is nothing inherent in the nature of a plea of guilty which, *ipso facto*, renders it a waiver of defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claim by available state procedures; therefore, principles of comity and the interests of orderly federal-state relations require that he should not be allowed to present these claims to the federal courts." (A. 121-122)

The majority found that the only available state procedure by which the validity of the confessions in these cases could be tested was the one declared "retroactively unconstitutional" in *Jackson* v. *Denno*. It viewed this as "even more damaging to an accused than lack of a right to appeal the intermediate order denying the Fourth

Amendment motion to suppress in *Rogers*" (A. 122).* Relying on the pre-*Jackson* procedure, the opinion held the respondents herein could not have been deemed to waive their confession claims "by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim" and could not be deemed to have entered voluntary guilty pleas if they were "substantially motivated by coerced confession[s], the validity of which [they were] unable for all practical purposes to contest" (A. 122, 125, 176).

In view of this reliance on *Jackson* v. *Denno,* it would seem that the issues to be resolved at a hearing are whether or not the confession was voluntary, and whether "the plea was freely made on advice of counsel because of the weight of the State's case aside from the confession, the apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence. . ." (A. 125).

In a separate concurring opinion, Circuit Judge Kaufman regarded the result reached by the majority as mandated by the decisions of this Court even though "the facts in the case under consideration may not be on all fours" with those decisions (A. 127) especially relying on *Machibroda* v. *United States,* 368 U. S. 487 (1962) and *Herman* v. *Claudy,* 350 U. S. 116 (1956). He suggested that where the prosecution had no evidence but an allegedly coerced confession and there was no adequate means of challenging the confession before trial, it would be "nothing less than fantasy" to say that the existence of the confession would not substantially motivate the plea. Acknowledging that "in the more common case" there is other evidence against the defendant, Judge Kaufman

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* It should be pointed out that in *Rogers* it was not the lack of a right to appeal which conferred habeas corpus jurisdiction but the existence of such a right.

nevertheless felt that the courts were not released "from the obligation to consider the possibility that the existence of the confession had a substantial motivational effect" (A. 130).

Judge Kaufman regarded it as "a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson* v. *Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them" (A. 131). He rejected the suggestion that pleas entered after *Jackson* v. *Denno* would be affected by court's ruling and stated that it was the petitioner's burden to establish substantial motivation.

Chief Judge Lumbard, in a dissenting opinion, stated his conclusion that the guilty pleas of Ross and Dash were "entered knowingly and without coercion".

> "It is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the judge would impose would be less than if they were to stand trial and be convicted" (A. 135).

He went on to state that the hearings which would be required by the retroactive application of *Jackson* v. *Denno*, would result "in profitless speculation and . . . an inquiry where no certain answers are possible" because of the virtual impossibility of reconstructing the prosecution's original case after the lapse of time (A. 135).

Judge Lumbard presented statistics which showed that about 95% of all convictions are based on pleas of guilty (A. 138-139). He pointed out that the system is advan-

tageous to all concerned and contended that if the decision to plead gulty could be placed in jeopardy many years later the State will have been deprived of a substantial part of the benefit of such a system. "Absent any fraud or overreaching existing at the time of the plea", neither the State nor the defendant should be able to reopen it (A. 138). He acknowledged that:

> "Were there any reason to suppose that injustice has resulted from the taking of pleas of guilty in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases." (A. 139).

Judge Lumbard stated that he would confine *Jackson* v. *Denno*, to those cases in which New York had used a confession at trial over an objection that it was coerced on the theory that in the case of guilty pleas:

> "[T]he unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determine since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-*Jackson* procedure has had a far more remote effect on the reliability of the process for determining guilt . . . in plea of guilty situations than it has had in cases which actually went to trial." (A. 140).

Moreover, he pointed out that a defendant was not precluded from going to trial before *Jackson* and that an attack on a confession was not futile since, even under that procedure, confessions were in fact held involuntary. Judge Lumbard then reviewed the petitions in light of the ma-

jority holding and found that, even under those principles, Ross and Dash were not entitled to evidentiary hearings.

A dissenting opinion by Judge Moore questioned the applicability of the standards for holding habeas corpus hearings stated by this Court in *Townsend* v. *Sain,* 372 U. S. 293 (1963), to convictions based upon pleas of guilty. Judge Moore also stated that the majority had failed in its effort to state a rule which would aid the district courts in reviewing guilty pleas since it had purported to utilize motivation for pleading as the test and then proceeded to order a hearing in Ross where the facts were strongest for denying a hearing under that test (A. 150-155).

The dissenting opinion written by Judge Friendly was premised on his determination that:

> "No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus 'voluntary' in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights." (A. 155).

He challenged the reliance of the majority on language from *Machibroda* v. *United States,* 368 U. S. 487, on the ground that that case involved an unkept promise regarding sentence and stated that a decision by this Court that Machibroda had alleged enough facts to require a hearing was not determinative of "the altogether different and highly important issue" raised in the instant cases. He challenged as well the majority's reliance upon *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, as also involving the use of language as authority in total disregard of the context in which it was stated (A. 156-157).

Judge Friendly criticized the majority for failing to set forth "intelligible guidelines" for when a hearing should be held or how the district courts should rule on petitions after holding hearings:

> "It is enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made 'but for' the confession, the trial courts are being given a job impossible of successful performance." (A. 158)

Judge Friendly sharply disputed the likelihood that the rule of these cases would be limited to pre-*Jackson* confession cases since he did not find persuasive the argument that the pre-*Jackson* procedure was, in fact, so unfair as to influence a decision to plead, especially in view of the availability of federal habeas corpus to test the confession. Finally he observed that "[i]t is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection from the court and on the advice of counsel" (A. 161).

In *Richardson,* the Court ordered an evidentiary hearing after concluding that the extensive colloquy at the time of plea and sentence was "not necessarily conclusive" (A. 169) on the question of whether the plea was voluntary and because of Richardson's claim that the plea was the result of the threatened use of a coerced confession which he had wanted to challenge but which his attorney allegedly had told him could be tested at another time.

In *Williams,* the Court concluded that the *Ross* and *Dash* cases required that an evidentiary hearing be held where the petitioner alleged that the confession was the only

evidence against him, that he had an alibi which his lawyer had refused to present to the Court and that the pre-*Jackson* procedure denied him a fair opportunity to test his confession. In *Williams* there was the further claim that the petitioner did not know all the consequences of his plea because he said that his lawyer told him that he was pleading guilty to a misdemeanor not to a felony (A. 174-178). Judge Lumbard dissented in the *Williams* case. He pointed out that it seemed highly unlikely that there was no other evidence in the case in view of the fact that the rape-robbery victim could possibly have testified against him. He also pointed out that absolutely no particulars were given with respect to the asserted alibi claim and found the likelihood that he believed that he was pleading to a misdemeanor incredible. In any event he pointed out that record evidence might be available to refute these claims without a full scale evidentiary hearing (A. 178-180).

Summary of Argument

With a singularly broad and ill-considered stroke, the majority below has opened for plenary collateral review all pleas of guilty entered in state and federal courts in the Second Circuit apparently both before and since *Jackson* v. *Denno,* 378 U. S. 368 (1964). This extraordinary and undesirable result stems from a misconception of the components of a knowingly and voluntarily entered guilty plea, a disregard of the role of counsel in advising such a plea, an erroneous idea of the meaning of "waiver" in the context of a plea, an overextended application of the rule of *Jackson* v. *Denno, supra* and an unrealistic approach to the allegations required to sustain a petition for federal habeas corpus.

The opinion below reaches behind a guilty plea to test an evidentiary defense which could have been tested at a trial. Recognizing that a guilty plea has hitherto been held to foreclose such a test, the majority, in terms scarcely

less conclusory than the instant petitions themselves, has satisfied itself with holding that the challenged evidence may have "induced" the plea and that the prospect of going to a constitutionally guaranteed trial presented a "hazard" rendering the plea involuntary. Thus it held that, after a hearing determined that the belatedly challenged evidence would not have been admissible, the judgment of conviction would be vacated if the guilty plea was found to be "substantially motivated" by the "existence and threatened use" of such evidence. This assessment would in turn be made on an evaluation of the other evidence available and the bargain which the petitioner was able to strike for a reduced charge or sentence.

The new hearings, premised as they are on misapplications of law and ephemeral standards of proof, will not in the least advance the office of the writ of habeas corpus. Prior law is fully adequate to find and correct cases of unconscionable custody, of factually documented genuine overbearing of will. The facts alleged in these cases and shown by these records do not reveal such overhearing and these respondents are not entitled to *post-facto* hearing to assert their evidentiary claims.

The role of evidence, as such, has not been, nor should it be grounds for challenging the validity of a plea merely because it was taken into account by a defendant in his decision to plead. The fact that the evidence is now alleged to have been illegally obtained is irrelevant unless the petitioner for habeas corpus can show that the claimed illegality was coercive and, as such, persisted without effective interruption ultimately inducing the plea. In such cases the plea is involuntary not because the evidence would have been inadmissible but because the illegal conduct continued to the time of and coerced the plea.

Traditional notions of waiver serve to confuse rather than focus this inquiry except insofar as that term describes the legitimate *result* of a voluntary plea as op-

posed to the considera'ions weighed by the defendant prior to entering it. In this connection, counsel's function of insuring that a defendant is aware of his rights and acts freely after evaluating the alternatives available should not provide a crutch for otherwise insufficient allegations attacking the plea—especially when the advice given was obviously sound at the time.

These insufficient allegations are not buttressed by reliance on this Court's decision in *Jackson* v. *Denno, supra,* striking down New York's trial procedure for determining the voluntariness of a confession. Persons who pleaded guilty were not subject to this procedure and no construction of *Jackson* v. *Denno* can support a holding that the fact that the jury ruled on voluntariness inhibited the right to go to trial. At the very least, *Jackson* should not be retroactively applied to persons so tangentially affected by its ruling made in open court in the presence of and after consultation with counsel.

POINT I

The existence and possible use at trial of a confession now claimed to have been coerced does not render involuntary a plea of guilty, entered as an alternative to trial and after consultation with counsel. Accordingly, such a claim does not entitle a petitioner for federal habeas corpus to an evidentiary hearing.

The respondents in these cases stand convicted on their admissions of guilt. Each now seeks to test the voluntariness of a prior confession—an evidentiary claim which could have been tested at the trial he chose to forego. Apparently recognizing that no evidentiary claim, standing alone, is relevant to the plea, each makes the facile additional claim that his plea, too, was involuntary because it was induced by the prospect that his allegedly involuntary confession would be introduced against him at trial. In holding that such a claim entitles a petitioner to an

evidentiary hearing on federal habeas corpus, the majority below viewed its holding as consistent with at least five other circuits. However, the language in most of those cases goes far beyond their facts and even within those circuits the approaches to evidentiary claims are not consistent. Compare, *e.g.*, *Reed* v. *Henderson*, 385 F. 2d 995 (6th Cir. 1967) with *Humphries* v. *Green*, 397 F. 2d 67 (6th Cir. 1968); *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5th Cir. 1967) with *Busby* v. *Holman*, 356 F. 2d 75 (5th Cir. 1966); and *Doran* v. *Wilson*, 369 F. 2d 505 (9th Cir. 1966) with *Thomas* v. *United States*, 290 F. 2d 696 (9th Cir. 1961). By contrast, the broad language of the opinion below is more limited than its application to the instant cases. These cases present no exceptional grounds for relief, yet they will be subjected to the fullest possible hearings. Clearly, except in the extraordinary case (*infra*, pp. 28-30), the claim of inducement adds nothing to the evidentiary claim itself and is not a predicate for relief.

A. The potential inadmissibility of evidence at a trial forms no part of the inquiry either initially or collaterally into the knowing and voluntary nature of a plea of guilty.

In order to satisfy the strictures of due process of law, a plea of guilty which forms the basis of a judgment of conviction must be entered knowingly and voluntarily. *Boykin* v. *Alabama*, 395 U. S. 238 (1969). A guilty plea is knowingly made when the defendant understands the meaning of the charge, what acts amount to being guilty of the charge and the consequences to him of the plea. *McCarthy* v. *United States*, 394 U. S. 459 (1969); *Kercheval* v. *United States*, 274 U. S. 220 (1927); *Edwards* v. *United States*, 256 F. 2d 707 (D.C. Cir. 1958), *cert. denied*, 358 U. S. 847. A plea is voluntary where it is not "induced by promises or threats which deprive it of the character of a voluntary act." *Machibroda* v. *United States*,

368 U. S. 487, 493 (1962). In *Machibroda*, a case concerning failure to comply with Rule 11 of the Federal Rules of Criminal Procedure, there was an allegation of an overt threat of a higher sentence if there was no guilty plea and of a warning not to relay the discussion between defendant and prosecutor to the defendant's lawyer. See also *Waley* v. *Johnston*, 316 U. S. 101 (1942) (threat by an FBI agent of incitement to hanging by publication of false statement); *Murphy* v. *Wainwright*, 372 F. 2d 942 (5th Cir. 1967) (14-year-old defendant interrogated by sheriff during recess in trial and allegedly threatened and told to plead guilty); *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963) (overt undenied threat by judge of higher sentence); *cf. Fay* v. *Noia*, 372 U. S. 391 (1963).

The availability of evidence to the prosecution has never formed a part of the inquiry into either knowingness or voluntariness. While the majority below recited the *Machibroda* standard, it distorted its meaning by equating the "threatened" use of evidence with the direct coercion of the plea alleged in that case. See *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960).

Every defendant knows that if he goes to trial evidence will be introduced against him and that if he does not go to trial it will not. Since the entire rationale of a trial is to create a forum for the presentation of evidence so that its adequacy to establish guilt of the charges may be determined, the threatened use of evidence hardly amounts to a denial of due process of law. It is the unequivocal right of every defendant to have just that "threat" carried out. Indeed, the recent due process safeguards announced by this Court are directed toward the defendant who goes to trial and insure the fairness of that trial. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Griffin* v. *California*, 380 U. S. 609 (1965); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Bruton* v. *United States*, 391 U. S. 123 (1968).

Assuming that a defendant makes no allegations of prior misconduct, no one would argue that his decision to plead guilty was constitutionally defective because the prosecution had a strong case. The fact that some of the prosecution's evidence is alleged now to have been obtained illegally does not alter its role as an influence in the decision to plead, except insofar as it may be an inducement to proceed to trial to test the issue. For the influence exerted by this allegedly illegal evidence *is as evidence*. It is not the fact that a confession may have been coerced which provides the inducement to plead. Rather, the "threat" faced by the defendants in such cases is that the confession will be used in evidence and the "fear" is that this evidence will be persuasive. However, both of these forms of "coercion" are simply factors in evaluating the likelihood of success at a trial—a rational evaluation made with the assistance of counsel. *Kent* v. *United States*, 272 F. 2d 795, 798-99 (1st Cir. 1959).

Other factors influencing the decision of a defendant who pleads guilty are a genuine desire to acknowledge his guilt and accept the consequences or an assessment of the likelihood of conviction, often balanced against the opportunity to plead to a reduced charge or the possibility of a lesser sentence. The respondents in all of the instant cases pleaded guilty to substantially less serious crimes than those with which they were charged. Ross was charged with one and Richardson with two counts of first degree murder. Each pleaded to one count of second degree murder.* Dash satisfied an indictment for rob-

* It has never been claimed that the possibility of capital punishment is an independent basis for attacking these guilty pleas (see *United States* v. *Jackson*, 390 U. S. 570 [1968]) nor did the Court below consider such an issue. It joined the murder and non-murder cases without differentiating between any legal consequences of the various sentences. Thus the issue is not before this Court. In any event, such claim could now only possibly be raised by Richardson, but since he rejected a plea to "Murder in the first degree with life imprisonment" the claim would be without merit.

bery in the first degree with his plea to robbery in the second degree. Williams pleaded guilty to robbery in the second degree in satisfaction of an indictment charging five felonies including rape and robbery in the first degree. Moreover, it is clear from the record that both Dash and Richardson rejected pleas to higher charges than those to which they ultimately pleaded (A. 25-26; 106).

The defendant must be able to make the required rational appraisal of the available alternatives in an atmosphere of relative freedom from coercive influences. *United States* v. *Colson,* 230 F. Supp. 953 (S.D.N.Y. 1964). This appraisal, including the role which evidence is likely to play at a trial, is to be sharply distinguished from those situations in which the atmosphere coercing a confession continues unbroken to the time of plea and infects the appraisal itself. *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116 (1956); *Gladden* v. *Holland,* 366 F. 2d 580 (9th Cir 1966); *United States ex rel. Perpiglia* v. *Rundle,* 221 F. Supp. 1003 (E. D. Pa. 1963). Cf. *United States ex rel. McCloud* v. *Rundle,* 402 F. 2d 853 (3rd Cir. 1968). These cases make it clear that a habeas corpus petitioner who can show a continuation of coercive elements from the time of confession to the time of plea, has always been entitled to relief.

Although the opinion below purports to rely on *Herman,* it does not require coercion at the time of plea, accepts the barest allegation of coercion at the time of confession and certainly requires no continuum of coercion from confession to plea. As Judge Friendly aptly commented in dissenting below:

> "No cumulation of resounding adjectives can conceal the chasm separating *Herman* v. *Claudy* from the case before us. If any such facts had been presented here, there would have been no *in banc* and no dissents." (A. 157)

An analogy may be drawn between these cases and those dealing with the voluntariness of successive confessions. In *United States* v. *Bayer*, 331 U. S. 532, 541 (1947), this Court held that it "has never gone so far as to hold that making a confession under circumstances which preclude its use perpetually disables the confessor from making a usable one after those conditions have been removed." In *Bayer*, the second confession, which was made six months after the first and after proper warnings had been given, was held voluntary.

A viable standard fully protecting a defendant's right to be free from unconstitutional coercion was announced by this Court in *Clewis* v. *Texas*, 386 U. S. 707, 710 (1967), holding involuntary a later confession on the ground that "[i]t plainly cannot . . . be separated from the circumstances surrounding the two earlier 'confessions'. There is no break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before."

This was precisely the situation in *Herman*, *Holland* and *Perpiglia*. In *Herman*, the petitioner, who was at no time represented by counsel, confessed after being held incommunicado for 72 hours during which time threats were made against him and his family. He ultimately pleaded guilty to more than thirty charges without being advised that in doing so he faced a maximum sentence of 315 years and after he was directed, without explanation, to sign, and forget, what proved to be his guilty plea.

The petitioner in *Holland* confessed, pleaded guilty to a rape charge and received a 20 year sentence within a 12 hour period. He was never represented by counsel although it was acknowledged that he had asked for and been denied a lawyer during his questioning by the police.

In *Perpiglia*, the petitioner, who was confined in a State Industrial School, was taken into custody by the police

pursuant to a writ of habeas corpus. Despite a magistrate's order to the contrary, the police kept him in their custody until his sentence, a period of 77 days, during which time he made a series of confessions and pleaded guilty to several charges. There was no record of the guilty pleas nor even of the number of charges to which he pleaded. Although by the time of plea his family had retained counsel, petitioner did not see counsel on the day of plea and was sentenced to 50 to 100 years. In finding coercion, the district court concluded that by virtue of the writ of habeas corpus, the petitioner and his counsel "had every right to believe that the police had the power and authority of the judge behind them." 221 F. Supp. at 1009.

Generally, however, a plea of guilty represents a break between any prior violation of rights and the judicial admission. The courtroom itself has a different atmosphere with procedural safeguards not present when a confession is given. It is made before a neutral judge (contrast *Perpiglia, supra*), in the presence of counsel and represents an affirmative act by the defendant including a new confession of guilt.

For example, in the instant cases each respondent was represented by counsel, each pleaded after judicial inquiry, each withdrew a prior "not guilty" plea and in each case there was a significant lapse of time between the alleged coercion of the confession and the plea and between plea and sentence. Ross claimed that his confession was obtained in May, 1954, his plea was entered in February, 1955 and sentence was imposed on March 14, 1955 (A. 4-10, 14). Dash claimed that his confession was given on February 25, 1959. His plea was entered on April 6, 1959 and sentence was passed on August 3, 1959 (A. 23). Williams alleged that he confessed on January 25, 1956 (A. 49). He pleaded guilty on March 16, 1956 and was sentenced on April 19, 1956 (A. 61). Richardson claimed that he confessed on March 24, 1963 (A. 78). His plea was

entered on July 22, 1963 (A. 88) and he was sentenced on October 9, 1963 (A. 93). Significantly, only Richardson claims that he ever sought to withdraw his plea and that claim was made only to take advantage of the fact that the minutes of plea and sentence before the district court, not reflecting such a motion, were not certified (A. 96-97).

B. A voluntary plea of guilty is an independent basis of conviction not dependent on evidence.

As this Court held in *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927):

> "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession, it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

No cases more clearly demonstrate the independent basis for conviction of a guilty plea than these. And if coercion did not directly infect the plea itself (*Herman* v. *Claudy, supra; Gladden* v. *Holland, supra; Perpiglia* v. *Rundle, supra*), these convictions are valid.

A knowingly and voluntarily entered guilty plea is not only a conviction but it is also a waiver of the right to a trial and its concomitants including the privilege against self-incrimination and the right to confront one's accusers. *Boykin* v. *Alabama,* 395 U. S. 238 (1969); *McCarthy* v. *United States,* 394 U. S. 459 (1969); *Kercheval* v. *United States, supra. Cf. Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938).

In a conceptual confusion typical of the opinion below the majority accepted both the rule that "a voluntary plea of guilty . . . is a waiver of all non-jurisdictional defects" (*United States ex rel. Glenn* v. *McMann, supra* at 1019), and the statement that "[T]here is nothing inherent in the

nature of a plea of guilty which *ipso facto* renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures; therefore, principles of comity and the interests of orderly federal-state relations require that he should not be allowed to present these claims to the federal courts." *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209, 213 (2d Cir. 1967) (A. 121-122).*

Not only do these two positions conflict, but the *Rogers* statement conflicts with the holdings of this Court. *Boykin* v. *Alabama, supra; Kercheval* v. *United States, supra.* The efficacy of the waiver of trial depends on the knowing and voluntary nature of the plea itself. However, once that determination has been made, each possible claim that might have been advanced on trial is not separately examined to determine if it, too, was waived. A man who does not go to trial does not have a "right" to object to any evidence which has not been used against him. It is just this sort of examination which a guilty plea *"ipso facto"* does foreclose. It is scarcely to be believed that, if the Court below had before it federal convictions, thus rendering inapplicable "principles of comity and the interests of orderly federal-state relations," it would not "presume" waiver by virtue of the plea itself.* See *United States* v. *Doyle,* 348 F. 2d 715 (2d Cir. 1965). See also: *Cantrell* v. *United States,* 413 F. 2d 629 (8th Cir. 1969); *Moore* v. *Rodriguez,* 376 F. 2d 817 (10th Cir. 1967); *Lattin* v. *Cox,* 355 F. 2d 397 (10th Cir. 1966); *Watts* v. *United States, supra.*

A voluntary plea of guilty is, in fact, both the most serious kind of waiver and the most reliable. It is the

* The adequacy of the records of plea and sentence (*Boykin* v. *Alabama, supra*) is not at issue in these cases. The Court below had before it only one such record, Richardson's, and that one is a model of thorough inquiry (A. 88-95).

most serious because it is "itself a conviction" (*Kercheval* v. *United States, supra* at 223) and a substitute for trial. It requires an affirmative act by the defendant who ordinarily withdraws a previously entered not guilty plea which, if undisturbed, would have resulted in a trial. It is the most reliable because it is made personally by the defendant after consultation with counsel (*Edwards* v. *United States,* 256 F. 2d 707 [D. C. Cir. 1958] (*cert. denied* 358 U. S. 847) in open court after judicial inquiry as to its knowing and voluntary nature.

Indeed, by virtue of its scope and the way it is made, a plea of guilty is qualitatively different from any other kind of waiver. It is wholly unlike the waiver by counsel of a trial right by virtue of a failure to object. See, *e.g., Henry* v. *Mississippi,* 379 U. S. 443 (1965). It is unlike the personal waiver by failure to take action such as filing a notice of appeal which may turn out not to have been a waiver at all. *Fay* v. *Noia,* 372 U. S. 391 (1963). It is not regarded with the suspicion with which a "waiver" of the most fundamental right of all, the right to counsel, is properly regarded. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).

These waivers by silence or inaction stand in marked contrast to the on-the-record affirmative statement by a defendant, after consultation with counsel, that he is exercising his option to plead guilty rather than to go to trial. There is no presumption against this waiver. Contrast *Johnson* v. *Zerbst, supra.* Rather, the judgment of conviction is itself entitled to a presumption of regularity.

The use of the term waiver in discussing all of the consequences of a plea of guilty has generated considerable analytical confusion. Thus the "waiver" in the rule that "a voluntary plea of guilty . . . is a waiver of all nonjurisdictional defenses" is not the traditional "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst, supra* at 464. It is clear

that for a plea to be knowingly and voluntarily entered, the defendant cannot be acquainted with all the details of the possible defenses and objections which might have arisen at a trial. Yet he is precluded from making them. This is a direct and legitimate result of the nature of his conviction, foreclosing such defenses and objections and not truly a "waiver," as the term should be used.

The principal result of a guilty plea is thus to forego the right to have the prosecution prove beyond a reasonable doubt, to a jury, at a trial free from harmful constitutional error, that it has sufficient admissible and credible evidence to sustain its charges. *Boykin* v. *Alabama, supra; Kercheval* v. *United States, supra.* The suggestion of the majority below that the right to test evidence has not been waived is therefore, clearly erroneous. That waiver is the very essence of the plea.

Even if the defendant had a right to object to evidence which was not introduced against him, the same rationale which dictates that the plea of guilty waives the right to test evidence also dictates that it waives subsequently announced evidentiary rights even when those rights are applied retroactively to cases that went to trial. By precluding the presentation of evidence, a defendant has rested his conviction on his own judicial admission and made unnecessary, if not impossible, the reconstruction of what might have been. Since the conviction does not rest on the presentation of evidence in the first place, the subsequent announcement of a new evidentiary rule bears no relationship to the reliability of the conviction by way of a guilty plea.

What the majority has done is to hold that a voluntary guilty plea entails knowing all the evidence which would be introduced at the hypothetical trial, knowing what the result would have been of any suppression motions and also knowing what subsequent changes in law might entail, and by logical extension, knowing what the result would have been on trial and probably on appeal. No plea

could withstand collateral attack if this were true. *Cantrell* v. *United States, supra.*

Thus, the discussion by the majority below of waiver is simply circular reasoning. If the plea of guilty is knowingly and voluntarily entered, it is a waiver of "all non-jurisdictional defects." If it is not so entered, it is a waiver of nothing and is not a conviction. The injection of the concept of waiver does nothing at all to advance the inquiry into voluntariness.

C. The role of counsel in advising a guilty plea should not be ignored.

Frequently coupled with a claim that the existence and threatened use of a coerced confession wrongfully induced a guilty plea is a concomitant allegation that counsel's advice with respect to the alleged coercion was somehow inadequate.

Although the Circuit Court pays lip-service to the relevance of counsel's advice in the decision to plead, in each of these cases it has accepted wholly unsubstantiated allegations regarding the adequacy of representation which, in another context, would not constitute sufficient grounds to order a hearing under its own decisions. *United States* v. *Garguilo,* 324 F. 2d 795 (2d Cir. 1963); *United States* v. *Wight,* 176 F. 2d 376 (2d Cir. 1949), *cert. denied* 338 U. S. 950 (a guilty plea case).

Advice by the attorneys in each of these cases to plead in order to avoid more severe penalties was, in itself, perfectly proper.* In effect, the present allegations by

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* "If a man is guilty, and the prosecution has a good case, there is little satisfaction to the lawyer or his client in trying conclusions and getting the maximum punishment. A great deal of good can be done in the plodding everyday routine of the defense lawyer, by mitigating punishment in this manner."

Steinberg, *The Responsibility of the Defense Lawyer in Criminal Cases,* 12 Syracuse L. Rev. 442, 447 (1961).

these petitioners that they believed that introduction of their confessions would be tantamount to conviction is an acknowledgment that this was good advice. The fact that one aspect of the law upon which the advice was premised subsequently changed (*Jackson* v. *Denno*, 378 U. S. 368 [1964] (*infra*, Point II), does not affect the integrity of the advice or the plea which followed (*Alexander* v. *United States*, 290 F. 2d 252 [5th Cir., 1961]; *United States* v. *Miss Smart Frocks, Inc.*, 279 F. Supp. 295 [S.D.N.Y. 1968]), especially where, as here, other considerations than just the available procedure undoubtedly entered into that advice.

Particularly inappropriate is the suggestion below that counsel's representation is not constitutionally adequate if he advises a guilty plea before all possible evidentiary hearings are held (A. 120), no matter how weak the claim or how strong the prosecution's case. Such a rule assumes away the competence of counsel to aid a defendant in evaluating the circumstances of his case. In addition, it elevates to a constitutional requirement N. Y. Code of Criminal Procedure §§ 813-c and -g providing for pretrial motions to suppress evidence. Even *Jackson* v. *Denno, supra,* did not hold that the forum for testing evidence must be made available before trial. Logically, moreover, the unique appeal provisions of those sections would also be constitutionally mandated.

As a practical matter, advising a defendant of the alternatives available is one of the important functions counsel performs at the pleading stage since "[i]t is apparent that the defendant needs to know the probability of being convicted should he stand trial". *American Bar Association Standards for Pleas of Guilty,* adopted February 1969, page 70. By accepting the self-serving allegations in the instant cases, however, the majority below has subverted this function of counsel. While acknowledging that counsel is necessary to insure the *knowing*

nature of the plea, the opinion simultaneously holds that if counsel performs this function he has provided his client with a basis for challenging the *voluntary* nature of the plea. Yet, logically, representation by counsel is either proper and insures the reliability of the conviction or it is inadequate and the conviction fails.

The crucial point is that this is primarily a counsel claim and only secondarily a plea claim and the failure of the Circuit Court to analyze it as a separate claim is a further reflection of the circular rule announced. If the counsel claim is substantial then it should be examined, but it should not resurrect the evidentiary claims even as a test of counsel's advice. *Busby* v. *Holman,* 356 F. 2d 75, 80 (5th Cir. 1966). Otherwise, the hearings held in the district courts will require exploration of the evidentiary allegations and a belated collateral assessment of whether or not counsel was in fact correct—an inquiry which bears no relation to the understanding nature of the plea or the voluntariness of the decision to plead and which is simply the evidentiary hearing on the purportedly waived claim.

Needless to say, the standards for determining the adequacy of representation should be no less stringent in the case of a guilty plea than in the case of conviction after trial. In both cases we may safely assume that the "convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence." *United States* v. *Garguilo, supra,* 324 F. 2d 797.

The allegations with respect to counsel in these cases fall far short of raising triable issues of fact. For example, Williams alleged that his attorney did not explain to him the difference between a felony and a misdemeanor and also knew that Williams had an alibi defense but refused to investigate it. Both allegations, raised for

the first time eight years after conviction are "palpably incredible." *Machibroda* v. *United States, supra* at 495. Williams had a long history of prior arrests and misdemeanor convictions. He did not allege that he did not know the difference between a felony and a misdemeanor, that he was surprised at his sentence or that he made any attempt to withdraw his plea. His alibi claim, made only in the brief annexed to the sworn petition, does not state a single evidentiary fact and would not support holding a hearing.

Richardson, in an affidavit submitted for the first time in the Circuit Court, alleged that his attorney merely conferred with him on one occasion for ten minutes and then again for three or four minutes on the day of the plea. He also alleged that counsel misadvised him as to his right to subsequently challenge his confession. Here, as in *Williams,* it is evident from the records as well as from the piecemeal presentation of these claims that they are mere afterthoughts. To begin with, Richardson's allegation that his attorney barely conferred with him is belied by the attorney's affidavit submitted to Supreme Court, New York County setting forth the services performed and requesting statutory compensation. He specifically refers to "conferences" with his client. Assuming that the conferences were as short as they are alleged to have been, it is nevertheless clear from the remainder of the affidavit that both assigned attorneys thoroughly examined the possibilities of going to trial. Moreover, "in spite of the shortness of the time, the appearance was not perfunctory. There is shown no lack of knowledge by counsel of either the facts or the law upon which counsel advised his client." *United States* v. *Wight, supra,* 176 F. 2d 378. This is borne out by the absence of any allegation that the briefness of the conference time precluded Richardson from relating to his attorneys the facts of the case and the facts of the coercion allegedly practiced on him. *Smith*

v. *Wainwright*, 373 F. 2d 506 (5th Cir. 1957), relied upon by the Circuit Court, is distinguishable. In that case the petitioner alleged that he was "*permitted* to confer with his court-appointed attorney for only 15 minutes" and that this one conference was held on the evening before trial—circumstances which may have effectively prevented counsel from adequately protecting his client.

Richardson's allegation that he was misadvised is unlikely, if not untrue, especially since it was made for the first time in the Court below.* Assuming, however, that the allegation is true, it is insufficient to require a hearing in view of the fact that counsel's advice in recommending the plea was plainly in Richardson's best interests. *Moore* v. *United States*, 249 F. 2d 504 (D. C. Cir. 1957).

Significantly, in none of the cases before this Court is there any substantial showing that counsel's advice to plead was incorrect or contrary to the defendant's best interest. Belated, conclusory allegations should not be a springboard for attacking counsel after he rendered "as effective service as could be rendered in the circumstances" of these cases. *Smith* v. *United States*, 304 F. 2d 403, 404 (D. C. Cir. 1962).

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* The history of Richardson's allegations suggests that he is not beyond fabrication in order to obtain relief. For example, after District Judge Brennan alluded to the fact that the minutes of plea and sentence submitted to him had not been officially certified, Richardson suggested that in the absence of certification a few pages might have been lost, which pages would show that he sought to withdraw his guilty plea—an otherwise wholly unsupported claim.

POINT II

The reliance below on *Jackson* v. *Denno*, 378 U. S. 368 (1964), to call into question all guilty pleas entered prior to the decision in that case where the existence of a coerced confession is alleged, is unfounded. In any event, *Jackson* v. *Denno* should not be retroactively applied to guilty plea cases.

In default of any factual allegations in the instant cases connecting the allegedly coerced confessions to the allegedly involuntary guilty pleas, the opinion below substituted a conclusion of law as the coercive element at the time of plea, to wit: the inability "for all practical purposes" to challenge the validity of the confession at trial because the procedure provided at the time of these pleas was declared "retroactively unconstitutional" in *Jackson* v. *Denno*, 378 U. S. 368 (1964). The effect is to presume the invalidity of all pleas entered before June 22, 1964 where it is alleged that a confession, which the petitioner believed to be coerced (contrast *Fay* v. *Noia, supra*), was obtained. *Jackson* v. *Denno* should have no such effect.

In *Jackson*, this Court overruled its own decision in *Stein* v. *New York*, 346 U. S. 156 (1953), because, under the procedure sanctioned in *Stein*, the possibility existed that the jury might hear a coerced confession and be unable to disregard it in making its determination on guilt or innocence.

However, it was not the threat of the *Stein* procedure itself but the possibility that the jury would hear a coerced confession which led to the *Jackson* result. If the confession in fact was voluntary, the use of the procedure was not error. This is conclusively demonstrated by the limited relief afforded in *Jackson* and by the subsequent

decision of this Court in *Pinto* v. *Pierce*, 389 U. S. 31 (1967).

Obviously, if it was the procedure itself which infected the trial, this Court in *Jackson*, would not simply have ordered rehearings on voluntariness but would have ordered new trials. In *Pinto* v. *Pierce, supra*, this Court upheld the validity of a trial at which the jury had heard the confession since the confession was voluntary and stated that it:

> "has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances."

Since the procedure itself did not invalidate all trials, its characterization by the majority below as posing a "hazard" unconstitutionally deterring the exercise of the right to trial is grossly inaccurate. In a directly analogous situation, this Court held that pre-*Griffin* v. *California*, 380 U.S. 609 (1965) procedures did not pose such a hazard to a defendant who testified before that decision, stating:

> "[C]omment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled." *United States* v. *Jackson*, 390 U. S. 570, 583, n. 25.*

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* The additional prophylactic benefit which might accrue to a defendant who wishes to testify but has a prior criminal record (*Jackson* v. *Denno, supra* at 389 n. 16) obviously is not the key to *Jackson* since it does not hold that such a person who did testify is entitled to a new trial. Moreover it should be pointed out

(*footnote continued on following page*)

So little did the majority below question its erroneous conclusion that the pre-*Jackson* procedure created an all pervasive "hazard" of going to trial, that it did not even make the issue of the allegedly deterrent nature of the procedure one of the issues to be considered at the wholesale evidentiary hearings which it mandated. Yet if this is the coercion claimed to invalidate the plea, it must be alleged and proved. It cannot be assumed, as the opinion below did.

The fact is that when these respondents pleaded guilty there was a procedure available to New York defendants to test the voluntariness of confessions sought to be introduced against them. This procedure was, as Judge Friendly said below, "a long way from denying an accused a reasonable opportunity to have the validity of his confession determined" (A. 160). It was possible, of course, that the confession might never have been offered. See

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(*footnote continued from previous page*)

first, that the allegation is not made by any of these respondents, second, that such evidence could be just as damaging before a judge, who would then submit the confession to the jury, and third, that it might be possible to show involuntariness without the defendant testifying.

In this connection, the reliance by the majority below on *Harrison* v. *United States,* 392 U. S. 219, 223 (1968) dealing with the use at a subsequent trial of testimony presented at an earlier trial to rebut an inadmissible confession, is clearly misplaced. In that case, the prosecution sought to take advantage of a prior illegal act on its part. No such determination had been made in any of these cases when the decision to plead was made. Thus, *Harrison* was specifically limited by this Court to the "case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief" 392 U. S. at 223, n. 9. The scope of the inquiry into the "why" of a plea of guilty is not expanded by *Harrison.* It still relates to knowingness and voluntariness as those terms have specifically been defined by other decisions of this Court. Finally, unlike the situation in *Harrison* the "whether" of the knowingness of a plea of guilty is as relevant as the "why."

People v *Donaldson,* 295 N. Y. 158, 65 N. E. 2d 757 (1946). It was also possible that it would be excluded before it went to the jury. See *United States ex rel. Fernanders* v. *Wallack,* 241 F. Supp. 51 (S.D.N.Y. 1965), *aff'd.* 359 F. 2d 267 (2d Cir. 1966), *cert. denied* 385 U. S. 880 (1966). Thus, even the "threatened use" is speculative and there certainly should be no presumption that the State would do an unconstitutional act. Moreover, as we have said, it would not be in every case, or even in most cases that the procedure would be unconstitutional, but only in those cases in which the confession was held to be coerced.

Even before *Jackson,* a defendant had the right to offer evidence and to have the Court rule preliminarily on his application to exclude his confession as involuntary (*People* v. *Alex,* 260 N. Y. 425, 183 N. E. 906 [1933]; *People* v. *Brasch,* 193 N. Y. 46, 85 N. E. 809 [1908]; *People* v. *Fox,* 121 N. Y. 449, 24 N. E. 923 [1890]; *People* v. *Tuomey,* 17 A. D. 2d 247, 234 N.Y.S. 2d 318 [2d Dept. 1962]; *People* v. *Nolan,* 2 A. D. 2d 144, 153 N.Y.S. 2d 905 [4th Dept. 1956]), albeit the hearing was held before the jury. *People* v. *Randazzio,* 194 N. Y. 147, 87 N. E. 112 (1909). Ironically, although the trial court could not hold a confession admissible as a matter of law (*People* v. *Pignataro,* 263 N. Y. 229, 188 N. E. 720 [1934]; *People* v. *Nunziato,* 233 N. Y. 394, 135 N. E. 827 [1922]), it could hold it inadmissible as a matter of law.

On appeal, neither the Appellate Division nor the Court of Appeals hesitated to order new trials where they found that a confession should have been excluded. See, *e.g., People* v. *Donovan,* 13 N. Y. 2d 148, 193 N. E. 2d 628 (1963); *People* v. *Noble,* 9 N. Y. 2d 571, 175 N. E. 2d 451 (1961); *People* v. *Oakley,* 9 N. Y. 2d 656, 173 N. E. 2d 48 (1961); *People* v. *Leyra,* 302 N. Y. 353, 98 N. E. 2d 553 (1951); *People* v. *Valletutti,* 297 N. Y. 226, 78 N. E. 2d 485 (1948); *People* v. *Barbato,* 254 N. Y. 170, 172 N. E. 458 (1930); *People* v. *Weiner,* 248 N. Y. 118, 161 N. E.

441 (1928); *People* v. *Insetta,* 19 A. D. 2d 702, 241 N.Y.S. 2d 294 (1st Dept. 1963); *People* v. *Price,* 18 A. D. 2d 739, 235 N.Y.S. 2d 390 (3rd Dept. 1962); *People* v. *Ruocco,* 11 A. D. 2d 807, 205 N.Y.S. 2d 119 (2d Dept. 1960), *reargument denied* 14 A. D. 2d 700, 219 N.Y.S. 2d 789 (2d Dept. 1961); *People* v. *Catalfano,* 284 App. Div. 569, 132 N.Y.S. 2d 217 (3rd Dept. 1954); *People* v. *Cohen,* 243 App. Div. 245, 276 N.Y.S. 851 (2d Dept. 1935); *People* v. *Moyer,* 186 A. D. 278, 174 N.Y.S. 321 (2d Dept. 1919); *People* v. *Reilly,* 181 App. Div. 522, 169 N.Y.S. 119 (1st Dept.), affd. 224 N. Y. 90, 120 N. E. 113 (1918); *People* v. *Crossman,* 184 App. Div. 724, 172 N.Y.S. 567 (3rd Dept. 1918). State collateral attack might also be available. See *People* v. *Robertson,* 12 N. Y. 2d 355, 190 N. E. 2d 19 (1963).

While there might be some deference to the jury's supposed finding (see *e.g., People* v. *Farrell,* 2 A. D. 2d 797, 153 N.Y.S. 2d 284 [3rd Dept. 1956]), each of these appellate courts could consider the question of coercion apart from the other evidence in the case.

Moreover, even where the appellate courts did not mandate outright exclusion of the confession, they did order new trials if all considerations relevant to the determination of voluntariness, such as delay in arraignment, had not been taken into account. See, *e.g., People* v. *Elmore,* 277 N. Y. 397, 14 N. E. 2d 451 (1938); *People* v. *Alex,* 265 N. Y. 192, 192 N. E. 289 (1934); *People* v. *Kelly,* 264 App. Div. 14, 35 N.Y.S. 2d 55 (3rd Dept. 1942).* Plainly, the procedure provided for the discovery of valid claims of coercion and such claims have always been treated with scrupulous attention in the state courts.

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* Failing state remedies, resort could be had to the federal courts for habeas corpus relief. See, *e.g., United States ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (2d Cir. 1955), *cert. denied* 350 U. S. 896; *United States ex rel. Wade* v. *Jackson,* 256 F. 2d 7 (2d Cir. 1958), *cert. denied* 357 U. S. 908; *United States ex rel. Corbo* v. *LaVallee,* 270 F. 2d 513 (2d Cir. 1959), *cert. denied* 361 U. S. 950 (1960).

Consequently, the possibility that the pre-*Jackson* procedure deterred trial is, as Judge Lumbard said below, "unquestionably remote and speculative" (A. 140). On the contrary, it was and is frequently in the defendant's best interest to go to trial and to cast any possible doubt on the voluntariness and hence on the truth of his confession. In fact, New York defendants, having had the pre-trial hearing mandated by *Jackson* v. *Denno, supra,* still go to trial and still demand that the issue of voluntariness be submitted to the jury and failure of the Court, when requested, to instruct the jury on voluntariness is reversible error, *People* v. *Vella,* 21 N. Y. 2d 249, 234 N. E. 2d 422 (1967); *People* v. *Prager,* 30 A. D. 2d 848, 293 N.Y.S. 2d 22 (2d Dept. 1968); *People* v. *Brown,* 24 A. D. 2d 740, 263 N.Y.S. 2d 449 (1st Dept. 1965).

A fortiori, it was and still is in a defendant's best interest, whatever the status of the confession and of the procedure for testing it, to go to trial in those cases where there was good reason to believe that the other evidence in the case aside from the confession was insufficient or did not corroborate the crime (New York Code of Criminal Procedure § 395). Indeed, a confession itself is not in New York sufficient basis to convict of a crime. There must be evidence which corroborates the fact that the act complained of was done and that it was done by criminal agency. A confession itself is not sufficient to establish the *corpus delicti.* See, *e.g., People* v. *Reade,* 13 N. Y. 2d 42, 191 N. E. 2d 891 (1963); *People* v. *Cuozzo,* 292 N. Y. 85, 54 N. E. 2d 20 (1944); *People* v. *Fitzgerald,* 288 N. Y. 58, 41 N. E. 2d 457 (1942); *People* v. *Popoff,* 289 N. Y. 344, 45 N. E. 2d 904 (1942); *People* v. *Mummiani,* 258 N. Y. 394, 180 N. E. 94 (1932); *People* v. *Ulisano,* 18 A. D. 2d 432, 239 N.Y.S. 2d 983 (3rd Dept. 1963); *People* v. *Phelps,* 13 A. D. 2d 675, 213 N.Y.S. 2d 492 (2d Dept. 1961); *People* v. *Aparo,* 285 App. Div. 1171, 140 N.Y.S. 2d 542 (2d Dept. 1955); *People* v. *Eller,* 108 N.Y.S. 2d 105 (Mag. Ct. N.Y.C. 1951) (not officially reported).

The benefits and safeguards in the prior New York trial and appellate procedures make it unreasonable to assume that defendants were deterred from going to trial. This is conclusively demonstrated by the instant cases. Ross made no such allegation. In addition he was aware that there would be the testimony of a witness and the introduction of real evidence. Richardson made the opposite allegation. He contended that he wanted to test the confession but was misadvised as to the proper time for doing so. Apparently if he had known that it was the only available procedure, he would have been willing to go to trial to test the confession. Williams alleged that the existence of the procedure would have prevented him from having a fair trial but did not allege that he knew of the procedure. Indeed, in view of his allegations that he spoke with his attorney only briefly, that that attorney refused to raise an alibi defense and misadvised him as to the nature of the crime to which he would be pleading and in view of his own description of himself as a "20 year old indigent youth" (A. 49), it is unlikely that he could maintain any such contention. Williams, moreover, did not allege how he would have wished to present his alibi defense and it is at least a reasonable assumption that he would have had to testify in order present it. In that event, there would have been no reason not to test the confession. Dash similarly made a conclusory *post facto* contention that the procedure itself would have prevented him from having a fair trial. However, he too did not state that this was a factor in his deciding to plead guilty. Furthermore, it is significant that his co-defendants who did proceed to trial succeeded in having their conviction reversed precisely because of the introduction of their confessions obtained after indictment in the absence of counsel. *People* v. *Waterman*, 9 N. Y. 2d 561, 175 N. E. 2d 445 (1961). These co-defendants received the benefit of a newly announced rule in New York

which only subsequently was held by this Court to be required. *Massiah* v. *United States,* 377 U. S. 201 (1964).

The precise state of mind which induced a guilty plea cannot be determined, but as Chief Judge Lumbard said, the impact of the pre-*Jackson* procedure is certainly far more remote in guilty plea cases than in cases that went to trial. We must of necessity deal in probabilities. Weighing these, it is clear that the pre-*Jackson* procedure was not so inadequate as to compel the conclusion of law that defendants were prevented from going to trial by that procedure or that their guilty pleas were coerced by it.

Certainly the existence of the pre-*Jackson* procedure should not be read as automatically requiring evidentiary hearings or the retroactive application of *Jackson* to guilty plea cases. This conclusion has been reached by at least New York (*People* v. *Dash, supra*) and Pennsylvania (*Commonwealth* v. *Garrett,* 425 Pa. 594, 229 A. 2d 922 [1967]). Indeed, the issue is not strictly one of retroactivity, although the same considerations apply. There is a qualitative difference between holding a trial procedural right retroactive to persons directly injured by the tainted procedure or evidence and applying that same right to guilty plea cases where any injury is at most indirect.

Whether or not to apply a new rule retroactively is assessed by this Court in terms of the purpose to be served by the new rule, the extent of the reliance by law enforcement authorities on the old standards and the effect on the administration of justice of a retroactive application of the new rule. See, *e.g., Jenkins* v. *Delaware,* 395 U. S. 213 (1969); *DeStefano* v. *Woods,* 392 U. S. 231 (1968); *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967); *Linkletter* v. *Walker,* 381 U. S. 618 (1965). *Jackson* v. *Denno* itself was held to be retroactive before this Court first fully considered the issue of retroactivity in *Linkletter* v. *Walker,*

supra. In the latter case it was said that *Jackson* was retroactive because its decision went to the integrity of the fact-finding process, that is to the reliability of the determination of guilt or innocence. Subsequent to *Linkletter* this Court gave only prospective effect to another case which also went to the integrity of the fact-finding process. *Tehan* v. *Shott,* 382 U. S. 406 (1965), holding *Griffin* v. *California,* 380 U. S. 609 (1965), not to be retroactive. In any event, whatever impact, the pre-*Jackson* rule had on the reliability of a jury verdict, it could not have such an impact where there has been a guilty plea and the fact-finding process is limited to the defendant's admission in open court that he is guilty of the crime to which he is pleading. Accordingly, protection of the fact-finding process is not at issue in these cases and to the extent that that is the purpose of the *Jackson* rule, it is not served by its retroactive application to guilty pleas.

Moreover, the reliance by law enforcement authorities on the *Stein* procedure can hardly be disputed. The procedure had been sanctioned by this Court and was the only procedure available to test an issue of fact. Indeed, it was believed by the courts that any other procedure would deny a defendant the right to have the jury assess the issue of fact. In this sense, *Jackson* represents a clearer case for non-retroactivity at least to guilty pleas than almost any other. Thus, *Mapp* v. *Ohio,* 367 U. S. 643 (1961), was held not to be retroactive despite the fact that the prosecution was on notice that the Fourth Amendment restriction against illegal searches and seizures applied to the states. *Wolf* v. *Colorado,* 338 U. S. 25 (1949). The standards of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), are not retroactive (*Johnson* v. *New Jersey,* 384 U. S. 719 [1966]), even though the absence of counsel might legitimately be held to go to the reliability of the confession itself. Moreover, this long sanctioned procedure did not carry with it any of the possible suggestions of bad faith

inherent for example in *Bruton* v. *United States,* 391 U. S. 123 (1968), held retroactive in *Roberts* v. *Russell,* 392 U. S. 293 (1968), where a co-defendant's confessions were deliberately spread before the jury. By contrast, in cases affected by *Jackson,* the prosecution was simply seeking to introduce evidence which the defendant had a right to have tested but which the prosecution had a right to introduce if it was validly obtained. Accordingly, the reliance factor was great.

Finally, the effect on the administration of justice of a retroactive application of *Jackson* v. *Denno* to guilty pleas would be staggering. It would apply to all guilty pleas where it is alleged that there was a confession, whether oral or written, and would apply as well to underlying convictions which form the basis for multiple offender treatment in New York. The applications would be brought at the discretion of the petitioners at any time after the conviction. In the instant case, Ross waited ten years to seek state relief (A. 14), Dash waited four years (A. 23), Williams waited eight years (A. 47) and, although Richardson waited only eight months to seek relief (A. 84), he waited five years to seek relief on the ground ultimately reached by the court below (A. 104).

Not only did the prosecutor rely in these cases on the constitutionality of the procedure for testing confessions, but more important he relied on the guilty plea itself. By this reliance he accepted a reduced charge, often dismissing other indictments and may have abandoned his investigation which could possibly have turned up more evidence of guilt. Of course, he abandoned the chance to have a complete record preserving the testimony and evidence of guilt, particularly since in these cases there were no appeals and there were no motions to withdraw the pleas. Thus, trial after vacation of the guilty plea is a far more difficult matter than retrial after a conviction has been vacated following a first trial. See *Jenkins* v. *Delaware, supra.*

Moreover, the rationale of the court below would not be limited to confesion cases but would extend also to cases in which it was alleged, for example, that a co-defendant's confession would be introduced at the trial (*Bruton* v. *United States, supra*), or where there was so suggestive an identification procedure that the trial must inevitably have been tainted. *Stovall* v. *Denno, supra.* All of these factors militate against a retroactive application of *Jackson* v. *Denno* to guilty pleas.

POINT III

The new rule announced below was inappropriately announced for the first time on federal habeas corpus. Moreover, the opinion sets forth no adequate guidelines for the conduct of the hearings which it mandates.

If the opinion below was correct in its theory that an evidentiary claim may affect the acceptable nature of a plea of guilty, the relevance of such a consideration is solely a supervisory matter for the judiciary. It should be announced only on direct appeal and not on collateral review of a final state judgment of conviction.

However, not only did the majority below inappropriately announce its new rule in a habeas corpus case involving state prisoners, but in doing so it provided no guidelines to judges who must now decide whether or not to accept a defendant's offer to plead guilty. No attention was paid to the insuperable problem of protecting future judgments of conviction based on guilty pleas from subsequent attack based on a potential trial error.

This disregard by the majority below for the crucial role of the judicial procedure at the time of plea and sentence led it into two fundamental errors. The first is that it ignored the fact that even under the strict standards for taking guilty pleas provided by Rule 11 of the Federal Rules of Criminal Procedure, evidentiary considerations

are irrelevant, but this is certainly strong proof that they are not factors going to the voluntariness of the plea. The corollary to that error is that if the colloquy does not provide at least the initial answer to the question raised, collateral attack inevitably will range over a broader area than the inquiry at the time of conviction itself. The plea will merely be the prelude to collateral attack and plenary investigation of evidentiary claims. It is one thing to say that a finding of voluntariness at plea may not be overcome by outside proof going directly to that issue itself. *Machibroda* v. *United States, supra.* It is quite another to say that an issue which properly was not considered at the time of plea can be the basis for collateral invalidation of that plea. *United States* v. *Morin,* 265 F. 2d 241 (3rd Cir. 1959).

The result below thus sharply contrasts with the policy of this Court which has recently tightened the procedures for the federal courts' acceptance of pleas of guilty under Rule 11 and set constitutional standards for the state courts' acceptance of such pleas. *McCarthy* v. *United States,* 394 U. S. 459 (1969); *Boykin* v. *Alabama,* 395 U. S. 238 (1969). A purpose of these opinions is to set forth the factors which must be established before a plea is acceptable, yet no suggestion that potential evidentiary defenses might be such a factor is found. This omission cannot be oversight for the inquiries mandated by these cases were intended "to make a complete record at the time the plea is entered of the factors relevant to the voluntariness determination." *McCarthy* v. *United States, supra* at 465.*

Even the prerequisites to a knowing and voluntary plea listed in *Boykin* did not include whether the defendant was

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* In *McCarthy* there was some evidence that the defendant did not fully understand what facts would amount to guilt of the charges. In *Boykin,* the defendant pleaded guilty to five capital charges not involving the taking of life and the record was absolutely silent as to the knowing and voluntary nature of the plea.

aware of objections which he could make at trial to any evidence which might be offered. The inescapable conclusion is that the availability of evidence is not a factor relevant to the voluntariness of a plea.

Thus it is apparent that the decision below was a radical break with prior decisions relating to pleas of guilty. Even the Court of Appeals was aware of this when they considered the issue *in banc*. Yet no consideration was given to the difficult problem of announcing this new rule on habeas corpus. Both the inevitable retroactive application of a rule announced on habeas corpus and the nature of the remedy itself should preclude such an announcement.

Certainly, the new rule should not be retroactively applied. In the first place, as we have pointed out, prior law was fully adequate to cope with genuine issues of involuntariness (*supra*, pp. 28-30). See *Stovall* v. *Denno*, 388 U. S. 293 (1967); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). In the second place, the States must have the opportunity to establish colloquy procedures which could take account of the new factor and thus forestall the proliferation of the innumerable and inevitable collateral attacks. *McCarthy* v. *United States, supra* at 469, 472. It is to be noted that in *Boykin* v. *Alabama, supra*, this Court cited with approval the New York case setting standards for an adequate colloquy. *People* v. *Seaton*, 19 N. Y. 2d 404, 227 N. E. 2d 294 (1967).

Considerations for the finality of these judgments of conviction make the retroactive application of this new rule particularly inappropriate. *Halliday* v. *United States*, 394 U. S. 831 (1969).

As we have said in dealing with the more limited question of the retroactivity of *Jackson* v. *Denno* (pp. 47-49 *supra*), the procedure for determining the voluntariness of confessions did not relate to the reliability of the fact-finding process, that is to guilt or innocence. These pleas

were entered in reliance on the law as it stood at the time and the plea itself has been relied on by the State. The pleas by their very nature preclude retracing what might have happened at a trial especially in light of the fact that there were no appeals and no motions to withdraw the pleas. We cannot know with certainly whether the evidence would have been excluded, or the substantiality of the other evidence which might nevertheless have led to a guilty plea. To test these allegations it would indeed be necessary to have the trial itself.

As the Court so accurately stated in *Cantrell* v. *United States*, 413 F. 2d 629, 633 (8th Cir. 1969):

> "After self-conviction by a guilty plea, no judge can evaluate what the outcome would have been had the plea been otherwise, had a trial taken place, and had an evidentiary issue been raised and decided. A motion to suppress might or might not have been well founded. The evidence in question might or might not have been the difference between conviction and acquittal. It takes far more, we feel, than a mere assertion that a[n] . . . issue is present which might have been raised, and which, if raised might have been decided in petitioner's favor, and which, if so decided, might have resulted in an acquittal. These are the very kinds of considerations which enter into the decision, by the defendant and counsel, whether to plead guilty or not guilty. . . . One does not deserve both the choice of plea and the advantage of hindsight."

The impact on the administration of justice would be incalculable. If the rule below applies not only to confession cases which predated *Jackson* v. *Denno*, but, as it seems to, to all pleas of guilty where evidence would have been introduced at a trial, it would affect virtually 95% of State court judgments of conviction, at least those entered prior to the passage in New York of New York Code of Criminal Procedure §§ 813-c and -g. This result, prem-

ised on a hypothetical state of facts not heretofore considered even relevant to the voluntariness of a guilty plea is insupportable.

The decision below does serious disservice to the nature of habeas corpus itself. Habeas corpus is an extraordinary remedy designed to provide relief from unconscionable custody. *Fay* v. *Noia,* 372 U. S. 391 (1963). A man who is held by reason of an involuntary guilty plea is entitled to that relief and it has been made available to such persons before the decisions in the instant cases. The majority below, in ordering evidentiary hearings on the strength of these unremarkable petitions, has simply built a bigger haystack in which to look for needles far more readily apparent before that decision. It is no answer to say that the court "merely" mandated hearings. Such hearings are an enormous and unnecessary burden on courts, prosecutors and witnesses (if any are still available). Indeed, if the opinion were merely requiring more hearings but on traditional standards, the result might be supportable. But the flood of hearings which will inevitably follow an affirmance of the decision below would have a stifling effect on the flexibility of the remedy described in *Fay* v. *Noia, supra.* Volume itself tends to rigidify procedures especially when the volume consists almost entirely of nonmeritorious claims which will be made and disposed of as a matter of course, although after an undue expenditure of judicial resources. The writ was never designed to do this office and its vital function should not be sapped by the additional burden imposed below.

The burden is increased first because there is no clear holding below and second because the hearings the opinion appears to require would be impossible to conduct under the standards supplied, as the dissenting judges vigorously pointed out (A. 136-137, LUMBARD, Ch. J.; A. 151, MOORE, C. J.; A. 158-159, FRIENDLY, C. J.). The absence of any clear holding means that it is not clear whether the evi-

dentiary claim must be coupled with an inadequacy of counsel claim (*Richardson, Williams*) with a claim of threats (*Dash*) or promises (*Ross*) or stands alone as a substantially motivating factor. Thus, the issue before the hearing court is imprecise at the outset.

Second, there are no guidelines along which the hearing court is to proceed. For instance: Is the first question the voluntariness of a "confession"? Before this inquiry must there not first be a determination of whether any confession or admission was made? Must there not also be a determination of whether or not all or any of such confessions or admissions would have been introduced at trial? Even if the confession is voluntary, is that a total defense to the petition? Is the nature of the statement, whether a full confession or an admission intended to be exculpatory relevant? Under the reasoning of the Court should a man who makes a good faith claim of involuntariness be deprived of his right to challenge it solely because the challenge would fail? How is the Court below to determine the importance of the confession in inducing the plea? Is the Court to hold a mock trial to weigh the importance of the evidence itself? Is the Court to inquire into the weight actually given the confession by the individual defendant and his lawyer?

The next problem facing the hearing court is that the facts which underlie any and all of these questions are likely to be undiscoverable. Therefore, the hearing court will be faced with *pro forma* claims and jerry-built constructions of forgotten facts which had never been structured before. The absence of witnesses as well as the musty memories of those who still can be found will result in a permanent distortion of the relevant events. A conscientious court thus will be forced to rely principally on standards and burdens of proof and presumptions. Interestingly enough, no discussion of standards, burdens

and presumptions is offered by the Court below. There is already considerable confusion in the Second Circuit in this area relating to voluntariness of confessions in habeas corpus cases. See, *e.g., United States ex rel. Cerullo* v. *Follette,* 393 F. 2d 879 (2d Cir. 1968), compared with *United States ex rel. Cerullo* v. *Follette,* 416 F. 2d 156 (2d Cir. 1969). It obviously would be intolerable for the State to bear the burden of proving the voluntariness of confessions which it never introduced at trial. Indeed the doctrine of presumption of regularity requires that in just the cases where the confession was coerced it should be presumed that the State would not introduce the tainted evidence.

Furthermore, these hearings would create a problem which has an analogue in other habeas corpus cases. It is well accepted that prisoners frequently make allegations under oath lightly and even perjuriously. Thus, when a decision such as that made in the instant case is rendered, hearings will automatically be ordered on the basis of *pro forma* allegations which may be totally false. Yet, no reasonable judge would grant a writ of habeas corpus solely on the basis of unsupported allegations on the part of the petitioner. Hearings should not be ordered where there is no chance of ultimate relief. At least if a case of such scope as the present one were to be confirmed, it ought to be done concomitantly with a strict requirement of substantial showing of merit. Some evidence (objective documents supporting witnesses, etc.) must support specific factual allegations by the petitioners before hearings should be ordered. While the Court below approved such a rule (A. 120), it did not follow it in any of these cases.

It should be remembered that the hearings accorded those who pleaded guilty under *Jackson* v. *Denno* are far more complicated than those afforded people who went to trial. The latter hearings involve only the question of voluntariness, the evidence concerning which usually was

on record and always had been unearthed at the time of trial. In the former cases, like those here, the evidence possibly was never known to the prosecuting attorney, let alone the judge. They frequently might not even know that there was a confession. Certainly, in most cases they would not have yet questioned the manner in which it was taken. The prosecution's weighing of the evidence in the case had not occurred. To recover such material after considerable passage of time (not less than six years in any case before this Court), is a mammoth task which ought not be shouldered by either federal or state judiciary unless the petition has a chance of success.

Thus, the effort by the Court below to limit the scope of its decision to "the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition . . .", actually expands the effect of its decision rather than limits it. For the Court never concludes what relief should be granted, but it does insure that a hearing must be held in every case in which an allegation is made that a defendant pleaded guilty before this Court's decision in *Jackson* v. *Denno, supra,* that he had made a confession and that that confession was coerced, even if no evidence whatsoever exists to support any of these allegations. However, if relief is not ultimately to be granted because of insufficient proof. it should not be intermediately granted to the extent of a hearing on that ground. That does not comply with, but rather violates, *Townsend* v. *Sain, supra.*

Where traditional claims of involuntariness and knowingness are adequately raised in a petition for habeas corpus, there is some reason to hold a hearing on those allegations. Otherwise there is not. The evidentiary claims raised by these respondents provide no basis for relief. The other allegations are either undocumented

(Dash's claim of a threat by the judge), conclusory (Williams' alibi defense), afterthoughts (Richardson's counsel claim, Williams' *Jackson* claim) or obvious fabrications (Richardson's claim that he sought to withdraw his plea). None mandate a hearing. If they did, the evidentiary claim would still be irrelevant. Since they do not, the evidentiary claim lends them no substance.

CONCLUSION

The decisions below should be reversed and the cases remanded with instructions to dismiss the petitions.

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Respectfully submitted,

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